

In situations where the franchising authority believes the proposed basic rate increase is outside the Commission's benchmark, the franchising authority is statutorily authorized to "enforce" the regulations prescribed by the Commission.<sup>220</sup> This enforcement power acts as a check on the cable operator's implementation of basic service rate increases without the inefficiency of a scheme permitting perpetual information requests before a cable operator's proposed basic rate increase is approved.

The Commission has offered alternative approaches to resolving disputes arising from local authorities' decisions regarding rate regulation.<sup>221</sup> Nashoba asserts that any such disputes should be resolved by the Commission, rather than the courts. Nashoba agrees with the Commission's analysis that resolution by the Commission "might assure a more uniform interpretation of the standards and procedures adopted pursuant to the [1992] Cable Act."<sup>222</sup> Uniform interpretation of rate regulation disputes by one body will provide better guidance than conflicting decisions made by many different courts applying different states' laws. Decisions made by the Commission will also provide immediate precedent for disputes by other parties over similar issues. Finally, resolution by the Commission will

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<sup>220</sup>47 U.S.C. § 543(b)(5)(A).

<sup>221</sup>See Notice at ¶ 87.

<sup>222</sup>Id.

be more expedient than a venture into crowded court dockets, and, therefore, is in accordance with Congress' intent, as stated in the plain language of the statute.<sup>223</sup>

In enforcing the new rate regulation provisions, Congress specifically did not include a provision allowing refunds where an increase in basic cable service rates is ultimately determined to be unreasonable.<sup>224</sup> Thus, the determination that basic service rates that have already gone into effect are, in fact, unreasonable, must be applied prospectively only. Accordingly, the Commission should not adopt the alternative it proposed in paragraph 83 of the Notice, wherein rate increases could go into effect automatically after the expiration of the thirty-day notice period, "subject to refund if the franchising authority ultimately determines the increase to be unjustified."

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<sup>223</sup>See 47 U.S.C. § 543(b)(5)(B) (regulations prescribed by the Commission under this subsection shall include "procedures for the expeditious resolution of disputes between cable operators and franchising authorities concerning the administration of such regulations").

<sup>224</sup>The 1992 Cable Act does contain a provision specifically authorizing refunds of unreasonable rates charged for cable programming services. 47 U.S.C. § 543(c)(1)(C). This provision originated in the House bill, apparently in response to concerns raised on the Senate floor that specific language was needed to ensure that consumers could receive funds of rates deemed unreasonable under the Commission's rules. See 138 Cong. Rec. S654 (Jan. 30, 1992) (statement of Sen. Metzenbaum). The fact that Congress specifically limited the refund provision to rates for cable programming services demonstrates that Congress was aware of the refund option, and knew that an express provision was needed, but chose not to adopt such a provision for basic service rates.

If a franchising authority finds a proposed increase in basic service rate to be unreasonable, the cable operator should be able to exercise some amount of discretion in making the rate reasonable.<sup>225</sup> For example, the cable operator should be able to reduce the basic service rate, or add sufficient services to the basic service tier to meet the applicable per-channel benchmark. The cable operator should be given a reasonable amount of time in which to make such changes to its basic rate or services. For example, if the operator elects a rate reduction, this could be implemented within thirty days. On the other hand, if the operator elects an increase in programming service, this decision could be conveyed to the franchising authority within thirty days, but might require some additional time to implement due to issues such as programming contracts, technical reconfiguration, marketing materials, etc.

Finally, any franchising authority that has approved a cable operator's current basic service rate prior to the implementation of these rate regulations on April 3, 1993 must be estopped from challenging that rate after implementation, even if the rate approved is higher than the Commission's new benchmark. If previously approved basic service rates could be subject to challenge immediately upon implementation of new rules, it could

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<sup>225</sup>See Notice at ¶ 86 (unless absolutely necessary, the franchising authority should not be able to set a rate for basic cable service itself; rather, as suggested herein, the cable operator should be given the opportunity to adjust either the rate or the services to fall within the Commission's bounds of "reasonableness").

be disruptive for cable operators and subscribers, resulting in otherwise unnecessary changes in billing, equipment and/or services subject to regulation.

### **III. CABLE PROGRAMMING SERVICE REGULATION**

#### **A. Non-Basic Rate Formula — The "Bad Actor" Test.**

Under the 1992 Cable Act, "cable programming service" is defined as follows:

Any video programming provided over a cable system, regardless of service tier, including installation or rental of equipment used for the receipt of such video programming, other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis.<sup>226</sup>

In essence, "cable programming service" includes any optional "tiers" offered over and above the basic level, but does not include any video programming offered on a per-channel or per-program basis.<sup>227</sup>

The FCC has requested comment on whether it should apply the same standard of reasonableness with respect to the regulation of non-basic service tier rates as it ultimately adopts with respect to the regulation of the basic level.<sup>228</sup> Although many of the concerns that Nashoba has raised with respect to the FCC's basic rate formula are equally applicable to the regulation of non-basic cable service tiers, substantial differences are warranted in the regulatory treatment of basic and non-basic services.

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<sup>226</sup>47 U.S.C. § 543(1)(2)

<sup>227</sup>See Notice at ¶ 95.

<sup>228</sup>Id. at ¶ 91 n.127.

Initially, it is clear from the language of the 1992 Cable Act and its legislative history that Congress did not intend for the same degree of regulatory oversight for cable service tiers as for the basic level. While Congress provided for concurrent jurisdiction over basic cable service rates to be exercised by local, state and federal authorities, regulatory jurisdiction over non-basic service tiers is limited to the FCC. By requiring local authorities to implement local basic rate regulation pursuant to guidelines established by the FCC, Congress contemplated that rate regulation of basic service tiers would be the norm, and not the exception, where cable systems are not subject to effective competition. In contrast, with respect to cable services, the statute limits the FCC's regulatory authority to establishing "criteria. . .for identifying, in individual cases, rates for cable programming services that are unreasonable."<sup>229</sup> Clearly, with respect to non-basic services, Congress contemplated that rate regulation would be the exception rather than the rule.

That rates for non-basic services were not to be subject to the same pervasive regulatory structure as basic service is also evident from the legislative history of the 1992 Cable Act. The House Report states that:

The Committee recognizes that since cable rates were deregulated in 1986, there has been an increase in the quality and diversity of cable programming. While most operators have been responsible about rate increases in

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<sup>229</sup>47 U.S.C. § 543(c)(1)(A) (emphasis added).

this deregulated environment, a minority of cable operators have abused their deregulated status and have unreasonably raised subscribers rates.<sup>230</sup>

The notion that the "bad actor" test would apply to only a distinct minority of cable systems is supported by floor statements made by some of the principal proponents of this legislation:

In addition to [regulation of basic rates] the bill includes provisions to rein in the renegades of the cable industry by requiring the FCC, on a per case basis, to regulate unreasonable rates charged for service.<sup>231</sup>

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In addition [to regulation of basic rates], S.12 includes what could be called a "bad actor" provision. This bill gives the FCC authority to regulate rates for tiers of programming other than basic, if it receives a complaint that makes a prima facie showing that a particular rate increase is unreasonable, and [t]his will give the FCC the authority to regulate in individual cases where cable operators impose excessive increases on subscribers.<sup>232</sup>

Given the fact that non-basic service tiers will, by definition contain those new video programming services which are being developed to provide the diversity of programming which the legislation seeks to foster, the FCC must be careful to avoid a formula for the regulation of non-basic rates that would provide

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<sup>230</sup>House Report at 86 (emphasis added).

<sup>231</sup>138 Cong. Rec. E1033 (April 10, 1992) (statement of Rep. Markey) (emphasis added). Similarly, in its summary released upon introduction of H.R. 4850, the House Telecommunications Subcommittee labeled this provision "Reining in the Renegades." Statement of Rep. Edward J. Markey, April 8, 1992.

<sup>232</sup>138 Cong. Rec. S561 (1992) (statement of Sen. Inouye).

disincentives to the development of these new services. Indeed, a similar concern was evidenced by Congress in the legislative history that accompanied prior versions of the legislation which contained a very similar provision allowing the FCC, in individual cases, to regulate unreasonable or abusive cable programming service rates. Thus, the House Report accompanying that earlier legislation stated that:

The Committee recognizes that there has been a correlation between increases in cable rates since they were deregulated in 1986 and increases in the quality and diversity of cable programming that those additional revenues have created. The Committee intends Federal policy to continue to provide cable operators and programmers with incentives to invest in improving the programming available to cable subscribers. In order to protect consumers, it is necessary for Congress to establish a means for the FCC, in individual cases, to identify unreasonable or abusive rates and to prevent them from being imposed upon consumers.<sup>233</sup>

The foregoing language demonstrates that in balancing the desire for greater diversity of service against the higher rates needed to support the development of new services, Congress felt that regulation of cable programming service tier rates was warranted only as a failsafe mechanism to safeguard the interests of consumers in the very rare individual cases where a particular rate could be demonstrated to be abusive or unreasonable. Accordingly, Nashoba supports the Commission's tentative conclusion that the "bad actor" formula should be designed to

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<sup>233</sup>H.R. Rep. No. 682, 101st Cong., 2d Sess. 82 (1990) (emphasis added).

"rein in" no more than the highest two to five percent of cable operators charging truly egregious rates.<sup>234</sup>

There are also significant differences in the criteria that the Commission is required to take into account in determining the reasonableness of basic and non-basic rates. With respect to basic rates, the statutory criteria relate either to the costs of providing or to revenues derived from services which are provided on the basic tier.<sup>235</sup> Even with respect to joint and common costs of providing cable service generally, the Commission is directed to consider only such portion of those costs as is reasonably and properly allocable to the basic service tier in deriving a formula for the regulation of basic rates.<sup>236</sup> In contrast, with respect to cable programming services, the Commission is directed to look beyond the costs of providing such services (although such costs are certainly to be taken into account) and to consider the rates for similarly situated cable systems offering comparable programming, the history of rates for cable programming services, and the rates, as a whole, for all basic and non-basic services and equipment offered on the system, but not including premium services.<sup>237</sup> Several observations flow from these differences.

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<sup>234</sup>Notice at ¶ 46.

<sup>235</sup>47 U.S.C. § 543(b)(2)(C)(ii), (iv), (vi).

<sup>236</sup>Id. at § 543(b)(2)(C)(iii), (v).

<sup>237</sup>Id. at § 543(c)(2)(A), (C), (D).

First, to the extent that the Commission adopts a basic rate formula that does not allow a cable operator to recover all costs of providing such service, plus a reasonable profit, it must allow cable operators to recover those costs and profit through higher rates for non-basic cable programming services. Any regulatory structure which does not allow cable operators to recover their full costs of providing cable service plus a reasonable profit would be considered confiscatory. Inherently, in such situations, non-basic rates cannot be judged by the same criteria applied to basic rates.

Second, with respect to the cable programming services, there is an even greater emphasis on comparing the rates on non-basic tiers with other comparable systems and allowing a greater deviation from the average within the zone of reasonableness established by the Commission as a safe harbor. Thus, while the statute requires the Commission to consider the rates for cable systems that are subject to effective competition in establishing its basic rate formula,<sup>238</sup> in determining whether a complainant has proven that non-basic rates are unreasonable, the Commission is required to consider the rates for similarly situated cable systems which offer comparable programming, whether or not such systems are subject to effective competition.<sup>239</sup>

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<sup>238</sup>Id. at § 543(b)(2)(C)(i).

<sup>239</sup>Id. at § 543(c)(2)(A), (B).

Third, the statute requires the Commission to examine "the rates, as a whole, for all the cable programming, cable equipment, and cable services provided by the system" other than premium services in determining the reasonableness of an operator's non-basic rate in individual cases.<sup>240</sup> Thus, with respect to non-basic rates, the Commission is not required to establish a separate benchmark of reasonableness for each different service tier and different category of equipment as it seems to believe it is required to do with basic service and equipment. Rather, the Commission is free to adopt a single safe harbor test to evaluate "bad actor" complaints based on an operator's rates as a whole. Such an approach would recognize that even if particular rates fall outside the safe harbor, a cable operator's rates as a whole might not be unreasonable if other rates fall below the applicable benchmark. Such an approach also will not prejudice the cable operator who maintains particularly low basic rates but a higher than average non-basic rate.

Indeed, the Commission should be sensitive to the fact that there are a virtually unlimited variety of tiers and packages which might be subject to review under the non-basic test. Creation of a separate benchmark matrix for each possible combination of rates charged for non-basic services and equipment would be an impossible task. Even a flat per-channel benchmark

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<sup>240</sup>Id. at § 543(c)(2)(D) (emphasis added).

would not account for fundamental differences in expanded cable service tier rates. For example, assume that the appropriate non-basic benchmark determines that one dollar per channel is the safe harbor non-basic rate for a particular system. Such a benchmark may provide a fair measurement for a ten-channel tier priced at ten dollars that contains cable programming networks of wide appeal and thus achieves virtually universal saturation.

However, assume that the same operator offers additional tiers over and above the "general audience" tier. One such tier might contain two or three channels of particular interest to sports fans, possibly even a regional sports network. Given the unreasonable salary commitments by sports teams, among other factors, sports programming can be among the most expensive to the cable operator. Moreover, such special interest or "niche" tiers typically achieve a much lower penetration level than general audience tiers. Tiers with lower penetration do not produce the same level of advertising revenue for the cable network, and thus fees paid by the cable operator are inevitably higher. Thus, at a very minimum, any such per-channel benchmark rate adopted for non-basic tiers should be adjusted upward to reflect the actual penetration. Hence, if one dollar per channel is reasonable for tiers achieving one hundred percent penetration, the per-channel rate would be two dollars for a tier achieving fifty percent penetration. This approach is consistent with Congress' goal of fostering a choice of more alternative packages to subscribers.

Alternatively, recognizing the greater flexibility given to the Commission in establishing a benchmark for the regulation of non-basic rates, the Commission's non-basic rate benchmark might take into account the overall revenue derived from all basic and non-basic tiers. For example, such a "basket" approach might compare the total per-subscriber service and equipment revenues received by a cable operator, perhaps on a per-channel basis, and excluding revenues derived from advertising, premium services and equipment, and compare this per-subscriber revenue against a per-subscriber revenue benchmark of similarly situated cable systems. Such an approach would be less burdensome on the Commission by obviating the need for separate analysis for each piece of equipment, service, and combination of service packages offered in situations where the overall rate charged by the operator is reasonable. Such an approach would also allow for greater flexibility in marketing of services and equipment which will allow cable operators to experiment with ways to most efficiently deliver video programming to subscribers.

As a final matter, the Commission should make absolutely clear that the packaging of services which are also offered on an unbundled basis, such as the offering of package discounts or packages of multiplexed services, does not render the package subject to rate regulation as a cable programming service. Section 623(a)(1) of the Act states that:

No Federal agency or State may regulate the rates for the provision of cable service except to the extent

provided under this section and section 612 [dealing with leased access].<sup>241</sup>

However, the statute expressly excludes "video programming offered on a per channel or per program basis" from the definition of cable programming services which are subject to Commission oversight.<sup>242</sup> As the D.C. Circuit Court of Appeals has explained, "cable operators typically market their service by bundling an assortment of channels together and offering them as a group, or 'tier.'"<sup>243</sup> Where services are offered on an a la carte basis, such as premium or pay-per-view services, they do not meet the definition of a service tier since they are not sold as a group for a single price.

If these services were to lose their character as per-channel or per-program services merely because they were included as part of a package discount or offered on a multiplexed basis, this would force cable operators to diminish marketing innovations and stop offering discounts. Ultimately this would reduce the programming choices made available to subscribers and actually require subscribers to pay more for premium programming.

Indeed, this point was expressly recognized with respect to multiplexed services in the House Report accompanying the legislation which states that:

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<sup>241</sup>47 U.S.C. § 543(a)(1).

<sup>242</sup>Id. at §§ 543(1)(2), 543(c).

<sup>243</sup>ACLU, 823 F.2d at 1565 n.29.

[I]t is the intent of the Committee that multiplexed premium services such as HBO1, HBO2, and HBO3 also be excluded from the term "cable programming service." The Committee does not intend that the trend toward offering multiple channels of commonly-identified video programming, that traditionally or historically were offered on a per channel or stand-alone basis, should result in an otherwise exempt service becoming subject to rate regulation.<sup>244</sup>

The same reasoning applies with equal force to package or volume discounts. Package discounts are not the bundling of services into a tier but rather reflect non-discriminatory economic incentives. The rate regulation provisions of the statute which expressly exempt services offered on an a la carte basis from regulation should not prevent the cable operator from providing two or more non-basic tiers of service at a reduced price to subscribers in a manner which may maximize efficiency in the distribution of video programming.<sup>245</sup>

#### **B. Procedural Issues.**

Regardless of the non-basic rate formula adopted by the Commission, given the fact the statute allows a single subscriber or franchising authority to file a complaint challenging the existing non-basic rate or any future rate increase for non-basic services, the Commission must quickly serve notice to these parties that a cable operator's non-basic rates will be given a high presumption of reasonableness and that such rates will be

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<sup>244</sup>House Report at 89-90 (emphasis added).

<sup>245</sup>The Commission has long recognized that in the rapidly evolving video marketplace, operators must have the maximum flexibility in packaging their services. Community Cable TV, Inc., 98 FCC 2d 1180.

found unreasonable in only the small minority of situations where such rates can be shown to be truly abusive. If the Commission, through delay, inadvertence or the failure to follow Congressional intent does not establish a mechanism to discourage the filing of frivolous and groundless "bad actor" complaints and for disposing quickly with such complaints, the Commission could find itself bogged down in individual rate hearings affecting virtually every cable system in the country. Such a result will have a chilling effect on the development of programming services and the implementation of emerging technological improvements.

The complaint procedure adopted by the Commission must require more than a mere allegation "that cable rates have risen unreasonably within a given period."<sup>246</sup> In order for a complaint to meet the minimum showing required by the statute, the Commission must be able to conclude, after review of the complaint and the answer, that the rates are so far beyond the norm as to be unreasonable. Where a cable operator's rates fall within the allowable safe harbor of any benchmark established by the Commission, the complaint should be dismissed because the rates have not been shown to be unreasonable. Since the "bad actor" test is simply meant to "rein in" the small minority of systems which have abused the public with unreasonably high rates, the complaint process must be ended if the operator meets the benchmark. Otherwise, each complaint would require a lengthy

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<sup>246</sup>Notice at ¶ 100.

administrative process, which ignores the Congressional mandate for a simple, minimally burdensome process.

The creation of a "safe harbor" pursuant to the benchmark approach for Section 623(c) is entirely consistent with the legislative history. In reconciling the House and Senate versions of legislation, the conference agreement permitted subscribers as well as franchising authorities to file complaints with respect to non-basic rates. In doing so, the conference agreement also did not include the language contained in previous drafts of the legislation requiring the complaint demonstrate a "prima facie case" that the rate in question is unreasonable. Rather, the statute allows the FCC to establish the "minimum showing" that will be required in order to obtain Commission consideration of the reasonableness of the rate in question.<sup>247</sup> The Conference Report makes clear that this change in language was intended only to make the requirements more understandable to non-lawyers.<sup>248</sup> There is absolutely no indication that in simplifying the process to make it accessible to consumers without the need to hire attorneys, Congress intended to shift the burden of demonstrating the reasonableness of non-basic rates to the cable operator in instances where the challenged rate is within the zone of reasonableness established by the Commission's benchmarking formula.

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<sup>247</sup>47 U.S.C. § 543(c)(1)(B).

<sup>248</sup>Conf. Report at 64.

On the other hand, where a rate exceeds the benchmark established by the FCC, the burden should then shift to the cable operator to demonstrate that its rates are not unreasonable despite the fact that they exceed the benchmark. The benchmark approach cannot preclude a cable operator from showing that its costs justify a higher rate than specified by the benchmark. Thus, a cable operator should be entitled to demonstrate that its rates are not unreasonable through submission of such cost of service or other data as it deems relevant. In particular, a cable operator showing that it is not making a reasonable profit per se must be found not to be charging unreasonable rates. A contrary result would clearly be confiscatory.<sup>249</sup>

In cases where a cable operator's cable programming service rates have been proven to be unreasonable, the cable operator should have the discretion to add additional cable programming services to its channel line up as an alternative to rolling back its rate. Such an approach would be entirely consistent with the Congressional policy to enhance the diversity of programming and would prevent rate regulation from providing regulatory obstacles to the accomplishment of this goal.<sup>250</sup> Moreover, while refunds may be required even though a rate rollback is not, we urge the Commission to recognize the serious administrative burdens associated with accounting for refunds of rates found to be

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<sup>249</sup>See, e.g., Matson Navigation Co., 959 F.2d at 1051.

<sup>250</sup>See Pub. L. No. 102-385, 106 Stat. 1460, ¶ 2(b).

unreasonable and distributing such refunds to subscribers as of the date when the complaint was filed, many of whom may no longer be subscribers or even residents of the community. Accordingly, we concur that a prospective percentage reduction in future rates would be easier to implement in situations where the operator elects a refund rather than an increase in service.<sup>251</sup>

#### IV. SMALL SYSTEM RELIEF

Under Section 623(i) of the Act, Congress directs the Commission to devise and implement regulations "to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers."<sup>252</sup> The Commission recognizes, however, that it has taken different approaches to defining an exempt "system" depending upon the particular regulation at issue. While it has in many cases applied a system-wide measurement, where appropriate it has continued to use a community unit approach.<sup>253</sup>

In considering the manner in which a "small system" is to be measured, the Commission must remember that rate regulation itself, under Section 623 of the Act, is not administered on the basis of a single integrated headend, each of which is frequently comprised of numerous individual franchises, but on the narrower basis of a community unit, which is individually franchised. The

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<sup>251</sup>Notice at ¶ 108.

<sup>252</sup>47 U.S.C. § 543(i).

<sup>253</sup>See Notice at ¶ 133; see also 47 C.F.R. § 76.12.

Commission must be careful not to disassociate the burdens and costs that go hand-in-hand with rate regulation from the basis upon which those regulations are imposed. Unless the exemption is applied on a franchise basis, rather than a system basis, the burdens and costs of rate regulation on cable operators and franchising authorities alike will not be accurately reflected.

In support of the use of a community unit measurement standard for small system relief, it should be noted that the Commission is obligated by Section 623(b)(2)(A) "to reduce the administrative burdens on subscribers, cable operators, franchising authorities and the Commission."<sup>254</sup> Furthermore, Subsection 623(i) requires that "in developing and prescribing regulations pursuant to this section,"<sup>255</sup> the Commission must define small system relief. This language reflects an understanding of all parts of Section 623, including the reduction in burdens for cable operators and franchising authorities under Subsection 623(b)(2)(A).

Furthermore, any measurement of subscribers on a system basis will discourage technological innovation associated with the elimination of outdated headends through the fiber optic interconnection of franchise areas. Under an unduly narrow construction of the goal of Subsection 623(i), a cable system currently comprised of three headends serving several franchise

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<sup>254</sup>47 U.S.C. § 543(b)(2)(A) (emphasis added).

<sup>255</sup>Id. at § 543(i) (emphasis added).

communities, each with under 1,000 subscribers per headend, would be eligible for relief in each of the three "systems." However, consolidation of those separate headends by an interconnection of the franchise areas into one headend via fiber optics would make the new "system" ineligible for small system relief. Measurement on a headend basis for purposes of eligibility for regulatory relief would, accordingly, act as a tremendous disincentive to such an upgrade of service and technology. Although still serving numerous separate franchise areas with under 1,000 subscribers each, the consolidated headend would now be providing service to more than 1,000 subscribers. The resultant increase in regulatory costs and burdens associated with such a technological improvement in the service may be so great as to make the installation of new technology far less likely.<sup>256</sup> Such would not be the case if the small system test were applied on a franchise basis, allowing operators to speed technological advances in program delivery among a larger base.

In addition to the 1,000 subscriber definition referred to above, there are other measurements that the Commission has used in the past, or that are under present consideration with regard to defining what constitutes a small cable system for various FCC

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<sup>256</sup>It has become more common that local franchising authorities will require cable operators in various neighboring communities to be interconnected to improve system quality, to develop joint access and program origination capability and to obtain uniform service offerings. These efforts should not be discouraged by defining the relief on the basis of the technical configuration of the system, which is irrelevant to the boundaries of rate regulation in the local franchise area.

purposes. If used as alternatives to the franchise-based test, these methods also could provide the Commission with a more accurate picture of the average small cable system. One such method is the density standard used in connection with the rural telco exemption and in the cable technical standards.<sup>257</sup> Based upon such a measurement, any cable system serving fewer than thirty homes per route mile should be considered small enough to qualify for relief from the administrative burdens associated with rate regulation, even if the franchised community contains more than 1,000 subscribers. Similarly, a measurement test that excluded from eligibility for small system relief any system serving a census designated place with a population of over 2,500 would serve the same purpose.<sup>258</sup> Each of these measurements is designed to foster an added competitiveness in systems laboring under the constraints of serving smaller, rural areas. Considering the added expense of serving such areas of low population density, including the necessity of constructing extended amplifier cascades in a manner that will allow the FCC's new technical standards to be met while at the same time requiring the recoupment of such costs from a smaller subscriber base, such relief would be appropriate.

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<sup>257</sup>See Telephone Co.-Cable Television Cross-Ownership Rules, 82 FCC 2d 233, ¶ 3; Cable Television Technical and Operational Requirements, 7 FCC Rcd 2021, ¶¶ 77-80 (1992).

<sup>258</sup>See 47 C.F.R. §§ 63.54 - 63.58.

Among the various ways in which the Commission should seek to reduce the regulatory burdens on small cable systems, the most effective and least burdensome method would be to exempt small systems from basic rate regulation altogether. After all, as stated in the 1992 Cable Act's legislative history, small cable systems serving "communities that have fewer than 1,000 households. . . have not been engaged in abusive practices."<sup>259</sup> Accordingly, it was not the nation's small cable systems at which such regulation was aimed. However, in order to provide some certainty that the Commission is not exempting cable systems truly large enough to enjoy some benefits resulting from economies of scale, the Commission could place a cap on the number of subscribers a cable system could have and still be eligible for small system relief. In that regard, a cap somewhere in the range of 15,000 to 20,000 subscribers, as measured on a system basis, seems appropriate.

If the Commission's regulations do not fully exempt small cable systems from rate regulation, the Commission should incorporate certain specific concepts into those regulations in order to provide adequate protection from unnecessary regulatory burdens for such systems. First, the Commission should adopt the concept of benchmark rates, for both basic and non-basic services, as an administratively simple method of rate regulation, rather than detailed, cost-based regulation.

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<sup>259</sup>138 Cong. Rec. H6525-26 (July 23, 1992) (statement of Rep. Bereuter) (emphasis added).

Under the benchmark approach, the Commission could establish a separate set of benchmarks designed to compare a small cable system's rates only to those of other like systems. Possible factors to be considered in setting a separate small system benchmark could include: (1) a channel capacity of twenty activated channels or less; (2) a density of less than thirty subscribers per mile; and (3) a system size of under 3,500 subscribers. If, however, the Commission declines to set separate benchmarks for small cable systems, it could instead provide small system operators with an additional cushion of twenty percent above each benchmark rate established for cable systems generally in an effort to recognize the higher costs associated with operating smaller systems.

Second, the Commission should require that all communities that have the authority and desire to regulate, and which are served by the same small cable system, file for joint certification by the Commission and be required to regulate jointly.<sup>260</sup> With the myriad operational and financial obstacles faced by small systems, it would be unreasonable for the Commission to subject such systems to the costs and burdens associated with separate regulation by each of the franchising authorities in its system. On the small system level, any financial resources that would have to be directed toward coping

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<sup>260</sup>Notice at ¶ 21.

with regulation by multiple franchises are resources that would have to be directed away from technological advances.

Finally, in tailoring its rate regulations to reduce the administrative costs and burdens on small cable systems, the Commission should provide such systems full relief from the reporting requirements the Commission may impose. Small cable systems are already subject to various costly and time consuming FCC reporting requirements (e.g., cumulative leakage index reports). Additional reporting requirements would be a further drain on small cable system resources unrelated to the provision of service to subscribers. Furthermore, any rate regulations not including these concepts stand a chance of opening up small cable systems nationwide to the potential for unnecessary, burdensome and costly regulation that is contrary to the intent of Congress.

## **V. GEOGRAPHICALLY UNIFORM RATES AND DISCRIMINATION**

### **A. Introduction.**

The 1992 Cable Act mandates that a rate-regulated cable operator's rate structure be uniform throughout the "geographic area" served by the cable system.<sup>261</sup> Section 623(d) should be considered as complementary to the 1984 Cable Act provision which requires franchising authorities to assure that access to cable service is not denied to any group of potential subscribers

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<sup>261</sup>47 U.S.C. § 543(d).

because of their income.<sup>262</sup> In short, Section 621(a)(3) prevents the cable operator from "redlining," i.e., not serving, unattractive neighborhoods; and Section 623(d) prevents the rate-regulated cable operator from disadvantaging those same neighborhoods by charging their residents higher prices than their more favored neighbors. This provision also must be construed in light of Section 623(e) of the 1992 Cable Act, which permits -- but does not require -- state, local and federal authorities to issue regulations "prohibiting discrimination among subscribers and potential subscribers to cable service."<sup>263</sup> Because Section 623(e) specifically identifies certain classes of subscribers (e.g., senior citizens, hearing-impaired persons), it is clear that Section 623(d) is intended to regulate only geographically-based price differences. Thus, for example, Section 623(d) does not speak to the question of whether a cable operator can charge a different price to an apartment owner who buys cable service "in bulk" than what it charges an individual consumer living in an apartment building.

Within the general framework of Section 623(d), however, there are three specific issues that need to be addressed:

- (1) When a single cable system serves more than one franchise area, must prices be uniform among those

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<sup>262</sup>Id. at § 541(a)(3). This provision also should be considered complementary to the typical franchise requirement that mandates that the cable operator build the entire franchised territory, or at least all of it with a minimum specified density of homes per mile.

<sup>263</sup>47 U.S.C. § 543(e).